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ENVIRONMENTAL  
HEARINGS OFFICE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

ITT RAYONIER INC.,	)	
	)	
Appellant,	)	PCHB
	)	No. 92-144
v.	)	
	)	FINDINGS OF FACT,
STATE OF WASHINGTON,	)	CONCLUSIONS OF LAW,
DEPARTMENT OF ECOLOGY,	)	AND ORDER OF DISMISSAL
	)	
Respondent.	)	

INTRODUCTION

On July 17, 1992, ITT Rayonier Inc. (Rayonier) filed a notice of appeal with the Pollution Control Hearings Board (Board) challenging Regulatory Order DE 80-196 (hereafter the Regulatory Order). The Regulatory Order was issued by the Department of Ecology (Ecology) in February 1980. Rayonier's notice of appeal in this case requests review of the Regulatory Order on two grounds: (1) whether the opacity limit contained in the Regulatory Order was properly derived under applicable statutes and rules, and (2) whether the order accurately reflects the intent of Rayonier and Ecology concerning the method by which Rayonier's compliance with the opacity limit can be verified.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER OF DISMISSAL

1 Ecology filed a motion to dismiss Rayonier's appeal. In  
2 support of its motion, Ecology submitted a memorandum and an  
3 affidavit of Assistant Attorney General Mary Sue Wilson.  
4 Rayonier filed a memorandum in opposition to Ecology's motion to  
5 dismiss. Rayonier also submitted declarations of two Rayonier  
6 witnesses and attached a total of nineteen exhibits to these  
7 declarations. Ecology submitted a memorandum in reply to  
8 Rayonier's memorandum. Ecology also filed a motion to strike  
9 Rayonier's declarations and exhibits, a memorandum in support of  
10 motion to strike, and a reply affidavit of Assistant Attorney  
11 General Mary Sue Wilson.

12 Having reviewed the foregoing motions and supporting  
13 documents, the Board now enters the following:

14 **FINDINGS OF FACT**

15 **I.**

16 In support of its memorandum in opposition to Ecology's  
17 motion to dismiss, Rayonier submitted a declaration of Robert  
18 Sistko with eight exhibits attached thereto and a declaration of  
19 Edward Button with eleven exhibits attached thereto.

20 **II.**

21 Consideration of the factual material contained in the  
22 Sistko and Button exhibits is not necessary for the Board to  
23 make a ruling on Ecology's motion to dismiss.  
24  
25  
26

1 III.

2 In February 1980, Ecology issued Regulatory Order DE 80-  
3 196. The Regulatory Order contains a ten percent opacity limit  
4 for the facility's recovery furnace system.

5 IV.

6 In 1991 and early 1992 Ecology took several enforcement  
7 actions, including the issuance of penalties, for alleged  
8 violations of the ten percent opacity limit specified in the  
9 Regulatory Order.

10 V.

11 Rayonier appealed the 1991 and 1992 Ecology enforcement  
12 actions to the Board. These appeals were designated PCHB Nos.  
13 91-200, 91-247, and 92-64. These appeals were consolidated for  
14 hearing. (These appeals are hereafter referred to as the 1992  
15 enforcement action appeal.)

16 VI.

17 The parties (Rayonier and Ecology) to the 1992 enforcement  
18 action appeal submitted a stipulated statement of the case to  
19 the Board and asked the Board to interpret the provisions in  
20 Regulatory Order DE 80-196 relating to the recovery furnace  
21 opacity limit and opacity monitoring obligations.

22 VII.

23 On June 19, 1992, the Board issued Final Findings of Fact,  
24 Conclusions of Law and Order in the 1992 enforcement action  
25 appeal. This decision included an interpretation of the  
26 Regulatory Order's opacity provisions.

VIII.

Rayonier appealed the Board's decision in the 1992 enforcement action appeal to Thurston County Superior Court. At the time of the Board's oral decision in this case (PCHB No. 92-144), no decision on Rayonier's appeal had been rendered by the superior court.

IX.

On July 17, 1992, Rayonier filed a Notice of Appeal from Regulatory Order DE 80-196. This appeal was designated PCHB No. 92-144.

X.

Although characterized as a direct challenge of the opacity limit contained in Regulatory Order 80-196, the Board concludes that this current appeal (PCHB No. 92-144) challenges the interpretation of the opacity limit upheld by the Board in the 1992 enforcement action appeal.

XI.

The issue presented by this appeal (PCHB No. 92-144) is the same issue previously presented to, and decided by this Board, in the 1992 enforcement action appeal.

XII

Any finding of fact deemed to be a conclusion of law is hereby adopted as a conclusion of law.

Based upon the foregoing findings of fact, the Board hereby enters the following:



1 opportunity to litigate the interpretation of the particular  
2 order or permit provision that is put at issue by the  
3 enforcement action. There is no other avenue for challenging a  
4 term of an order or permit after the expiration of the  
5 applicable statutory appeal period.

6 V.

7 The enforcement actions taken by Ecology in 1991 and 1992  
8 raised the issue of the interpretation of the opacity provisions  
9 set forth in the Regulatory Order.

10 VI.

11 The 1992 enforcement action appeal afforded the parties an  
12 opportunity to litigate the issue of the interpretation of the  
13 opacity provisions set forth in the Regulatory Order. The final  
14 decision rendered by the Board in the 1992 enforcement action  
15 appeal addressed this issue.

16 VII.

17 This appeal (PCHB No. 92-144) does not present any issues  
18 different from those presented and adjudicated in the 1992  
19 enforcement action appeal.

20 VIII.

21 The proper avenue for challenging the Board's 1992 decision  
22 is a superior court appeal.

23 IX.

24 Any conclusion of law deemed to be a finding of fact is  
25 hereby adopted as a finding of fact.

26

1 Based on the forgoing findings of fact and conclusions of  
2 law, the Board enters the following:

3 ORDER

4 Ecology's Motion to Strike is granted, therefore, the Board  
5 has not considered the declarations and attached exhibits  
6 submitted by Rayonier in rendering its decision on Ecology's  
7 Motion to Dismiss.

8 Ecology's Motion to Dismiss is granted; Rayonier's appeal  
9 is dismissed with prejudice.

10 DATED: this 7th day of January, 1994.

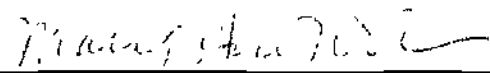
11 POLLUTION CONTROL HEARINGS BOARD

12   
13 ROBERT V. JENSEN, Chair  
14

15   
16 RICHARD C. KELLEY, Member  
17

17 Presented by:

18 CHRISTINE O. GREGOIRE  
19 Attorney General

20   
21 MARY SUE WILSON, WSBA #19257  
22 Assistant Attorney General  
23 Attorneys for State of Washington  
24 Department of Ecology

23 HELLER, EHRMAN, WHITE & MCAULIFFE

24   
25 JOHN W. PHILLIPS, WSBA #12185  
26 Attorneys for ITT Rayonier Incorporated

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER OF DISMISSAL